STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

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| NEWARK FRATERNAL ORDER OF POLICE, LODGE No. 4, | : | |
| Charging Party, | : | |
| v. | : | U.L.P. No. 93-10-092 |
| CITY OF NEWARK, | : | |
| Respondent. | : | |

UNFAIR LABOR PRACTICE CHARGE

The City of Newark (hereinafter "City" or "Respondent") is a public employer within the meaning of §1602(l) of the Police Officers' and Firefighters' Employment Relations Act, 19 Del.C. Chapter 16 (1986), (hereinafter "Act"). The Fraternal Order of Police Lodge No. 4 (hereinafter "Lodge No. 4", "FOP", or "Charging Party") is the exclusive bargaining representative of all the City's police officers, except the Chief, within the meaning of §1602(g).

On October 12, 1993, Lodge No. 4 filed an unfair labor practice charge against the City alleging violations of §§1607(a)(1), (a)(5) and (a)(6) of the Act. [1] A hearing was held on November 29, 1993, for the purpose of establishing a factual record. The parties agreed to brief the legal issues. The final brief was received from Lodge No. 4 on March 25, 1990.

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[1] 19 Del.C. §1607, Unfair Labor Practices - Enumerated, provides in relevant part:

(a) It is an unfair labor practice for a public employer or its designated representative to do any of the following:
  (1) Interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under this chapter;
  (5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit;
  (6) Refuse or fail to comply with any provision of this chapter or rules and regulations established by the Board pursuant to its responsibility to regulate the conduct of collective bargaining under this chapter.

## BACKGROUND

Charging Party contends that when, during the course of collective bargaining in 1988, it raised the possibility of submitting unresolved issues to fact-finding, the City responded that fact-finding would not alter its position on unresolved issues. The parties' labor negotiations subsequently reached impasse. When mediation failed to produce a settlement, the Union petitioned the Public Employment Relations Board (hereinafter "PERB" or "Board") to approve fact-finding. The fact-finder's recommendation adopting the last, best and final offer of Lodge No. 4 as the basis for resolving the dispute was rejected by the City.

Thereafter, on or about November 15, 1988, the City modified its position concerning the pension benefit and employee contribution issues. Lodge No. 4 then offered a counter proposal which it claims would have cost the same as the City's prior offer.

When the City rejected the Union's counter proposal, Lodge No. 4 filed an unfair labor practice charge alleging the City's refusal to accept Charging Party's counter proposal violated its duty to bargain in good faith, as required by §1607(a)(5) of the Act.

Following the agreement of the parties to the terms of a successor agreement, the unfair labor practice charge was withdrawn by the FOP on January 31, 1989.

On October 28, 1992, the Union filed a second unfair labor practice charge alleging conduct by the City which interfered with the rights of bargaining unit members in violation of §§1607(a)(1) and (a)(2) of the Act.

That charge was dismissed on January 4, 1993, at the mutual request of the parties after a negotiated Letter of Understanding resolved the matter.

## FACTS

The allegations which form the basis of the current charge result from certain acts attributed to the City during collective bargaining which commenced on February 2, 1993.

On or about March 31, 1993, there was discussion between the parties concerning the eventual submission of unresolved issues to fact-finding. At that time, the City's chief negotiator, Charles Zusag, allegedly told the Union's bargaining committee that regardless of what the fact-finder might do, the City's position on unresolved issues would not change.

After impasse was declared on April 8, 1993, the parties participated in mediation pursuant to §1614 of the Act which also failed to produce a settlement. On June 23, 1993, Lodge No. 4 requested PERB to approve fact-finding pursuant to §1614 of the Act. Attached to the request as Exhibit B was the Last Best Offer of the City signed by Charles Zusag and as Exhibit C, the Last Best Offer of the FOP signed by Thomas Penoza, President of Lodge No. 4.

On July 20, 1993, after reserving Council Chambers in the municipal building for the fact-finding hearing, the PERB provided the City with multiple copies of the Notice of Fact-finding with instructions to post the notices in a conspicuous place in each building in which Lodge No. 4 members worked and in the City's office at least one (1) week prior to the hearing date of August 2, 1993.

The fact-finding hearing was held on the appointed date in a second floor conference room located in the municipal building. The fact-finder's report, issued on August 9, 1993, recommended the last, best and final offer of Lodge No. 4 as representing the more equitable resolution of the unresolved issues.

As required by §1615(h) of the Act, a meeting involving both parties, the fact-finder and a representative of the PERB was scheduled for August 20, 1993. During the meeting further efforts to resolve the dispute were unsuccessful. During the

discussions, the City offered a package addressing all four (4) issues, including full wage retroactivity, a reduction in the amount of the employee pension contribution and required the Union to drop its demand for retiree identification cards and reduced to twelve (12) the number of months upon which the final average compensation component of the pension calculation would be based.

Following the Union's rejection of the package, it was agreed that the Newark City Council would review the fact-finder's report and recommendations at its next meeting scheduled for Monday, August 23, 1993. The parties were to meet on Tuesday, August 24, 1993, to review the position of City Council. The report of the fact-finder was to remain confidential until the PERB was notified on Wednesday, August 25, 1993 of the status of the impasse.

After the City Council met and rejected the fact-finder's report, but prior to the meeting with Lodge No. 4 on Tuesday, August 24, City Manager Carl Luft scheduled a press conference with a reporter from the local Newark newspaper for 8:30 a.m. and a reporter from the nearby Wilmington newspaper for 10:30 a.m. on Wednesday, August 25, 1993.

On September 1, 1993, the parties again met for further negotiations. During that session the City informed the Union that the 4% wage increase was no longer retroactive to March 31, 1993. This resulted in a heated debate during which the City's chief negotiator is alleged to have told the Union's bargaining team that he disliked fact-finding and there was a cost for the Union's having pursued the impasse to fact-finding.

The unfair labor practice charge which is the subject of this decision was subsequently filed on October 12, 1993. The essence of the charge is that the City has engaged in conduct which violates its duty to bargain in good faith. The essence of the charge is that the City has engaged in: (1) surface bargaining; (2) conduct designed to interfere with, restrain or coerce its employees in their right to try to

resolve bargaining disputes through the statutory fact-finding process; and (3) conduct in violation of its obligation under §1615 of the Act. (Union's Opening Brief @ pg. 1)

## PRINCIPAL POSITIONS OF THE PARTIES

Charging Party:

The FOP contends the City's rejection of the fact-finder's report in August, 1993, when considered in light of its prior statements in 1988 and 1993 concerning the futility of fact-finding and the City's rejection of the fact-finder's report in 1988, evidences a hostile state of mind unwilling to consider the statutory fact-finding process as a basis for resolving the collective bargaining impasse.

According to the FOP, the City's contempt for its statutory obligation is further evidenced by the City's: (1) failure to post notices of the public fact-finding hearing scheduled for August 2, 1993, as required by the Board's published Rules and Regulations; (2) unilateral change in the location of the fact-finding hearing; and (3) failure to meaningfully participate in the fact-finding process.

The FOP further alleges that the City has (1) failed to provide its chief negotiator with the level of authority necessary to conduct meaningful negotiations; (2) adopted a hard line "take it or leave it" position concerning wage retroactivity; (3) engaged in misleading bargaining tactics; (4) withdrawn from tentative agreements; (5) scheduled two press conferences to review City Council's position in order to gain an unfair advantage in publicizing the City's position to the media before the parties met on August 24, 1993, and before notifying the PERB as agreed to on August 20, 1993; (6) refused to provide the Union with a copy of the City's position statement given to the press on August 25; and (7) on September 1, 1993, withdrew from the agreement reached on August 20, 1993, for full wage retroactivity. (Union's Opening Brief @ pg. 6).

The FOP contends that by these acts, the City has engaged in conduct in violation of §1607(a)(1), (a)(5), and (a)(6), as alleged.

Respondent:

The City denies any wrongdoing. Specifically it maintains that: (1) the alleged statements and incidents cited by the Union in 1988, 1989, and January, 1993, are both untimely and unrelated to the circumstances giving rise to the instant charges; (2) its chief negotiator possessed the authority necessary to participate in meaningful negotiations; (3) it did not take the position that fact-finding would have no impact upon the City's bargaining position but only reminded the Union that fact-finding was a non-binding process; (4) the notice of fact-finding was properly posted in the lobby of the municipal building; (5) it provided meaningful input at the fact-finding hearing of August 2, 1993; and (6) the change in the location of the fact-finding hearing was mutually agreed upon by all parties, including the fact-finder.

The City further argues that aside from the fact that it was under no obligation to provide the FOP with a copy of its position statement concerning the fact-finder's recommendations, the FOP suffered no harm from the City's refusal to do so since Captain Penoza had received a copy from a reporter on August 25, 1993, the same day that the City released the statement to the press.

## ISSUE

Whether the conduct of the City constitutes unfair labor practices in violation of 19 Del.C. §§ 1607 (a)(1), (a)(5) and (a)(6), as alleged?

## OPINION

The Delaware PERB concluded in 1984 that alleged violations of the duty to bargain in good-faith are best resolved based upon an examination of the "totality of

conduct". Seaford Education Association v. Bd. of Education of the Seaford School District, PERB Case No. 2-2-84S (1984).

The FOP argues that the City's overall conduct during the 1993 contract negotiations should be considered as evaluated within the context of the parties' ongoing relationship. Its argument is not without merit. Justice Frankfurter observed:

> A determination of good faith or of want of good faith normally can rest only on an inference based upon more or less persuasive manifestations of another's state of mind. The previous relations of the parties, antecedent events explaining behavior at the bargaining table, and the course of negotiations constitute the raw facts for reaching such a determination. NLRB v. Truitt Manufacturing Co., 351 U.S. 149 (1956).

The incidents relied upon by the FOP to document the nature of the parties' relationship include two (2) unfair labor practice complaints previously filed by the FOP in January, 1989, and October, 1992, and testimony from various witnesses attributing disparaging comments to the City's chief spokesperson, Charles Zusag, during the 1988 collective bargaining negotiations, concerning the futility of the fact-finding process and the City's subsequent refusal to accept the fact-finders recommendations as the basis for resolving the 1988 collective bargaining impasse.

The City argues that events occurring in 1988 are untimely and, therefore, unrelated to and have no bearing upon the resolution of the current matter.

The PERB has previously held that incidents preceding the ninety (90) day filing period provided for in PERB Rule 5.2(a)(2) are admissible in a subsequent action if they are determined to be relevant to the alleged commission of an unfair labor practice occurring within the ninety (90) day statutory period. This does not, however, permit the litigation of prior incidents for which the statute of limitations has tolled. Sussex County Vocational Technical Teachers' Association v. Bd. of Education, U.L.P. No. 88-01-021 (1988).

In the charges cited by the FOP, the City did not file an answer to either prior to the dismissal by the PERB of the first charge at the request of the FOP and of the second charge at the mutual request of the parties following a negotiated settlement. Having been resolved to the mutual satisfaction of the parties, the merits of these two (2) charge are no longer ripe for litigation. To conclude otherwise would require the parties to litigate untimely issues or those previously resolved and, in so doing, discourage voluntary resolution efforts.

The record of each case, however, stands on its own merit. After reviewing each, it is determined that both are relevant to this proceeding insofar as they document the presence of a difficult relationship between the parties dating back to at least early 1988.

Similarly, the statement attributed to the City's chief negotiator during the 1988 negotiations concerning the futility of fact-finding, if supported by credible evidence, may be considered in weighing the credibility of testimony concerning similar allegations contained in the current charge.

Captain Thomas Penoza, current President of Lodge No. 4, was a member of the FOP bargaining committee during the 1988 negotiations. Captain Penoza testified that when fact-finding was first discussed in 1988, Mr. Zusag stated that fact-finding would not alter the City's position.

The testimony from Captain Penoza concerning Mr. Zusag's comment in 1988 is unrebutted by any City witness.

The FOP alleges that Mr. Zusag, again the City's spokesperson during the 1993 negotiations, made similar comments when fact-finding was raised by the FOP on March 31, 1993. Patrick Corcoran, a police officer in the City of Newark for approximately eleven (11) years, was a member of the FOP's 1993 bargaining committee. Officer Corcoran testified that when the FOP first raised the possibility of fact-finding, Mr. Zusag stated "... it would not change my mind about anything. I

have the support of City Council behind me and if you don't like it, that's too bad. That's the way it is."

Robert Agnor, a seven and one-half (7 1/2) year veteran police officer and member of the FOP's 1993 bargaining team also testified Mr. Zusag stated that fact-finding would not change the City's position.

Corporal James Weldin has been employed by the City for twelve and one-half (12 1/2) years and has served on four (4) FOP collective bargaining committees. He served as the FOP's chief spokesperson on several occasions, including 1993. Corporal Weldin testified that when, on March 31, 1993, he asked Mr. Zusag whether the City would be willing to accept a fact-finder's recommendation, Mr. Zusag responded that no matter what the fact-finder did, it would be unacceptable. According to Corporal Weldin, Mr. Zusag further stated he had the authority of City Council and that's just the way it would have to be.

Corporal Weldin also testified that on September 1, 1993, Mr. Zusag stated that he did not like the statutory impasse resolution process and believed that it needed to be changed. During a somewhat heated discussion concerning the issue of full wage retroactivity, Mr. Zusag is also alleged to have informed the FOP's bargaining team that there were costs associated with its decision to proceed to fact-finding. Corporal Weldin construed these comments to mean that full wage retroactivity was denied the FOP as a penalty for exercising its right to submit the impasse issues to fact-finding. He so concluded because Lodge No. 4 was the only City union with access to fact-finding and the other unions representing City employees received full wage retroactivity, although each settled after the expiration of their respective collective bargaining agreements.

Officer Gerald Simpson has been a police officer in the City of Newark for approximately six (6) years and was a member of the FOP's 1993 collective bargaining committee. Called as a rebuttal witness, Officer Simpson's testimony essentially

corroborated that of Corporal Weldin concerning Mr. Zusag's withdrawal of full wage retroactivity on September 1, 1993, and his comment that "there are costs associated with what you do."

Charles Zusag has been the Assistant to the City Manager since November, 1985. In this capacity, he serves as chief spokesperson for the City in labor-management negotiations. Although unable to recall his specific comments on March 31, 1993, Mr. Zusag testified he intended only to remind the FOP that the recommendations of the fact-finder were advisory only and the City was not required to accept them, by law. When pressed by counsel for his precise statement, Mr. Zusag responded, "My best recollection is that I said fact-finding was advisory and that the City was not required to accept the recommendations of the fact-finder." (Transcript @ p. 84).

Mr. Zusag testified that although he did not recall making the statements attributed to him by Corporal Weldin and Officer Simpson on September 1, 1993, he believes, "... that Unions are prone not to negotiate and go right to fact-finding and hope ... that someone else will be a little bit more sympathetic to their proposals. What they can't get at the negotiating table, they might try to have someone else impose upon the employer." (*emphasis added*)

In addition to Mr. Zusag, Police Chief Hogan was the only other member of the City's bargaining team. Like Mr. Zusag, Chief Hogan did not recall the precise comments of Mr. Zusag on either March 31, or September 1, 1993. He believed, however, Mr. Zusag's comments on March 31 were intended to express a desire to continue the negotiations and seriously try to resolve the outstanding issues across the bargaining table without resorting to more formalized procedures.

Where, as here, there is vague and/or conflicting testimony, credibility considerations must necessarily be addressed. More important than the inability of Mr. Zusag and Chief Hogan to recall, with any degree of certainty, what Mr. Zusag

said at the March 31 or September 1, 1993, negotiating sessions, is the fact that their recollections of what he intended on March 31, 1993 are quite different and unrelated.

Their testimony must be weighed against the testimony of Officers Corcoran and Agnor and Corporal Weldin, which is not only consistent but also corroborated by the following independent considerations:

First, there was no reason for Mr. Zusag to consider it necessary to remind the FOP's bargaining committee that fact-finding was advisory only and not binding upon the City. The parties previously participated in fact-finding in 1988, at which time the City rejected the recommendation of the fact-finder. The composition of the FOP bargaining team had not significantly changed between 1988 and 1993 and was, therefore, fully aware of the non-binding nature of the fact-finder's recommendations.

Second, Lodge No. 4 is the only City union covered by the fact-finding provisions of the Act. Therefore, Mr. Zusag's use of the plural term "unions" when testifying about his belief of what happens when fact-finding is available reflects a state of mind generally antagonistic to the concept of fact-finding and consistent with the statements attributed to him by the several witnesses for the FOP.

Third, Mr. Zusag's testimony concerning his belief that fact-finders impose settlements upon employers is inconsistent with his testimony that on March 31, 1993, he intended only to remind the FOP that fact-finding was advisory and not binding upon the City.

There is no simple formula for separating one version from another where there are conflicting or vague perceptions of the same event. However, based upon the foregoing discussion, the testimony of Officers Corcoran, Agnor and Simpson and Corporal Weldin is credited as more accurately representing the substance of the comments attributed to Mr. Zusag on March 31, and September 1, 1993.

The unfair labor practice charge raises issues concerning the City's: (1) compliance with PERB procedures related to the posting of the notices of the fact-finding hearing on August 2, 1993; (2) alleged failure to meaningfully participate in the fact-finding hearing; and (3) refusal to provide the Union with a copy of its position statement issued to the press in response to the fact-finders recommendations.

A letter dated and mailed on July 13, 1993, to Mr. Zusag from the PERB provided, in relevant part:

> By copy of this letter, I am enclosing copies of the Notice of Public Fact-finding hearing which must be posted in a conspicuous place in each building where affected employees work and in the office of the public employer at least one week prior to the hearing.

The Notice provided:

> CITY OF NEWARK
> and
> F.O.P. LODGE No. 4
>
> The hearing in this matter will be convened by the fact-finder, Molly H. Bowers, appointed by the Public Employment Relations Board and in accordance with 19 Del.C. §1615, for the following purposes:
>
> "... in order to define the area or areas of dispute, to determine facts relating to the dispute and to render a recommendation on unresolved contract issues."
>
> DATE: Monday, August 2, 1993
> TIME: 10:00 a.m.
> PLACE: Newark City Council Chambers
> 220 Elkton Road
> Newark, DE 19715

The posting requirements are clear and unambiguous. The Respondent, by stipulation at the fact-finding hearing, acknowledges that it posted only one (1) notice of hearing in the lobby of the Municipal Building. Although police officers are required to periodically enter the Municipal Building when appearing in magistrate court, each of the four (4) FOP witnesses denied ever having seen the notice posted in the lobby of the municipal building.

More importantly, despite the instructions for posting, the City unilaterally determined not to post the notice in the police station on East Main Street, a considerable distance away from the Municipal Building, which was, at the time, the primary headquarters for the City's police officers represented by Lodge No. 4.

On August 2, 1993, the date of the fact-finding hearing, Mr. Zusag advised the fact-finder and the FOP representatives that the hearing would be held in the City Manager's conference room, located on the second floor of the Municipal Building. While acknowledging there was no objection registered by either the fact-finder or Lodge No. 4, the FOP denies the parties agreed to change the location of the hearing.

The City presented no evidence to support its claim that the conference room was more appropriate for the hearing than were Council Chambers. To the contrary, it is a matter of record that Council Chambers was the site of the previous fact-finding hearing in 1988. The City Manager's conference room was considerably smaller than Council Chambers and consisted of four tables arranged in a square in the center with chairs placed around the sides of the room. Council Chambers was considerably larger and presented an environment more appropriate for conducting a formal administrative hearing.

In the absence of an objection by either the fact-finder or the Union, however, the last minute changing of the location of the fact-finding hearing is not, in itself, of critical importance. What is significant, however, is that despite its responsibility to post the initial notice, the City posted no notice of change in the location at the entrance to the Council Chambers. In the absence of a notice, the location of the hearing was unknown to the affected employees, members of the public who may have desired to attend and representatives of the PERB who were present to record the hearing.

The extent of the City's participation in the fact-finding hearing is also at issue. §1615, Fact-finding, provides in relevant part:

(e) The fact-finder shall hold hearings in order to define the area or areas of dispute, to determine facts relating to the dispute and to render a recommendation on unresolved contract issues ... *(emphasis added)*

(f) The fact-finder shall make written findings of fact and recommendations for the resolution of the dispute; provided, however, that the recommendations shall be limited to a determination of which of the parties' last, best and final offers shall be accepted in its entirety. In arriving at recommendations, the fact-finder shall specify the basis for the findings, taking into consideration, in addition to any relevant factors, the following:

(1) The interests and welfare of the public
(2) Comparison of the wages, salaries, benefits, hours and conditions of employment of the employees performing the same or similar services or requiring similar skills under similar working conditions and with other employees generally in the same community and in comparable communities and in private employment in the same community and in comparable communities.
(3) The overall compensation presently receive by the employees inclusive of direct wages, vacations, holidays, excused leaves, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment and all other benefits received.
(4) Increases in the weekly average wages earned in the private sector within the State as computed by the Department of Labor.
(5) Stipulations of the parties.
(6) The lawful authority of the public employer.
(7) The financial ability of the public employer based on existing revenues, to meet the costs of any proposed settlements; provided that any enhancements to such financial ability derived from savings experienced by such public employer as a result of a strike shall not be considered by such fact-finder.
(8) Such other factors not confined to the foregoing which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding or otherwise between parties, in the public service or in private employment.

§1615 clearly sets forth the responsibilities of the fact-finder and the criteria to be considered in issuing his or her recommendation for settlement.

On July 9, 1993, the PERB advised the fact-finder, Dr. Mollie Bowers, of her selection by the parties. The following last, best and final offers submitted by the parties were enclosed:

FOP Last, Best Offer

1. 4% salary increase effective 4-1-93

2. 4% salary increase effective 4-1-94

3. Identification cards for retirees

4. The final average compensation for retirement to be the highest 12 months instead of the last 36 months.

5. Reduce the employee pension contribution from 6.25% to 5.25%.

*/s/ Thomas Penoza*

CITY OF NEWARK
LAST, BEST OFFER
TO
FRATERNAL ORDER OF POLICE LODGE #4

1. City agrees to increase annual base salary rates by 4% effective upon ratification of contract by union and by 4% effective one year after first increase.

2. City agrees to amend pension ordinance by reducing employee contribution from 6.5% to 5.5% effective upon ratification by union and to 5.0% effective one year after first reduction.

3. City and union agree to withdraw all other proposals.

*/s/ Charles Zusag*

During the hearing, the FOP's presentation to the fact-finder consisted of a seven (7) page narrative and twenty-one (21) pages of summary charts and graphs comparing: (1) the Newark police pension plan with those of non-police employees of Newark, police officers from New Castle County, State of Delaware, City of Dover, and City of Wilmington; (2) a comparison of starting salaries and after eight years with the aforementioned police departments; and (3) longevity pay, shift premium and education incentive pay with the aforementioned police departments. This information was supplemented with a separate binder of supporting detailed documentation.

The City's presentation, on the other hand, consisted exclusively of a two page document containing opinion and conclusions unsubstantiated by direct evidence in

the form of either testimony or factual data. [A copy of the City's presentation is attached hereto as Attachment A].

The City does not argue that it was uninformed concerning the form or substance of the fact-finding hearing. To the contrary, the City's authorized representative in the 1988 fact-finding hearing was the same as in the 1993 fact-finding hearing.

During direct examination of the City's chief spokesperson at the unfair labor practice hearing, the following exchange occurred:

> Q. What were the unresolved issues going into fact-finding?
>
> A. The retroactivity, wage retroactivity, was one of them. The police proposal for changing their pension formula for final average compensation from thirty-six to twelve months. The retiree's I.D.'s. And I think, the amount of reduction in the employee pension contribution. *(Transcript @ p. 87).*

Subsequent direct examination included the following exchange:

> Q. Did you present information on the comparable benefits available to other police officers?
>
> A. No.
>
> Q. Why didn't you present that information?
>
> A. Well, again, at the fact-finding it was my understanding of the issues that the only thing separating us at that point was the twelve month final average compensation. That was the only issue. I didn't expect the FOP to refuse to settle if we wouldn't agree to the retiree I.D. cards, so I didn't spend a lot of time devoted to that issue. I thought the only thing separating us and the key to the settlement was the pension issue.

The degree of consistency in positions taken is a valid consideration from which an inference of good or bad faith bargaining may result. The parties' submission of their last, best and final offers served as notice of the issues to be addressed at the fact-finding hearing. The City's prior knowledge of the four (4) outstanding issues to be addressed at the fact-finding hearing is confirmed by the initial testimony of Mr. Zusag, as noted above. No explanation was offered, no is one apparent, for his subsequent inconsistent testimony that at the fact-finding hearing

his understanding was that the pension issue involving the FOP's twelve (12) month average compensation demand was the only issue preventing settlement.

The substance of the City's prepared statement, of which approximately one (1) page addresses the four (4) issues presented to the fact-finder, speaks for itself. The impact of the parties' presentations upon the fact-finder is best addressed by considering each issue individually.

(1) Wage Retroactivity: In its statement before the fact-finder, the City argues that while it has always proposed that a negotiated pay increase becomes effective upon ratification by the bargaining unit members, even if that occurs prior to the expiration date of a current contract, partial retroactivity for the FOP remained negotiable. *(City's fact-finding statement @ p. 1).*

Despite the City's position, it is undisputed that the other two (2) bargaining units of City employees who are not protected by legislation similar to the *Police Officers and Firefighters Employment Relations Act* and, therefore, have no access to impasse resolution procedures received full wage retroactivity. Although both settled after the expiration of their respective collective bargaining agreements each received full wage retroactivity.

In rejecting the City's position the fact-finder observed, in part:

> It [the City] maintains that this position is warranted because the Union has a "history" of engaging in protracted negotiations and it does not want to reward this behavior by affording retroactivity in like manner to those Unions which settled timely... Several factors of record influenced the Fact-Finder's opinion on this issue. She took judicious note that the City, at no time before or during the instant proceeding, made a proposal that would indicate to the Union and/or the Fact-Finder what time frame it had in mind to be "negotiable" for the purposes of establishing retroactivity. It is unreasonable for the City to expect the Union to bargain blind on this issue by advancing a series of proposals, all of which the City rejects until it gets what it wants. Such behavior borders on or is, in fact, evidence of bad faith bargaining.

The City's intention of not rewarding the Union for unduly prolonging negotiations, i.e., beyond the expiration date of the current agreement, by

withholding full wage retroactivity, is misleading. Mediation cannot be unilaterally invoked except within the thirty (30) day period immediately preceding the expiration of the collective bargaining agreement. Only when the negotiations have not been satisfactorily resolved following a reasonable period of mediation can fact-finding be requested. 19 Del.C. §1614 (1986). Thereafter, the PERB conducts an investigation to assure that fact-finding is appropriate and in the public interest. A panel of five (5) prospective fact-finders is submitted to the parties from which names are alternately stricken. After a fact-finder is selected and appointed, the process can continue for up to an additional forty-five (45) days. 19 Del.C. §1615 (1986).

Clearly, the time lines established by the legislature for mediation and fact-finding require the parties' continuing and meaningful participation in good faith bargaining beyond the expiration of the existing collective bargaining agreement.

Under the circumstances present here, the FOP would have received no reward by settling early, as the City claims. The agreed upon four percent (4%) wage increase for the police in each year of the contract was equal to the percentage increase granted to the City's other unions. The City's sole reason for denying full wage retroactivity was because settlement was not achieved prior to the contract date of expiration. Therefore, only by resolving all contract issues prior to the City's unilaterally imposed "no-penalty" deadline could the FOP realize the full value of the negotiated wage increase. To do so would require the FOP to accede to the City's position insofar as all outstanding issues were concerned and forego the available impasse resolution procedures. In reality, the negotiated four percent (4%) wage increase was illusory and the penalty for the FOP's choosing to exercise its statutory right to pursue the available impasse resolution procedures was severe.

In the absence of any justification other than the explanation offered, the City's refusal to negotiate over the subject of full wage retroactivity violates

§1607(a)(1) of the Act, which provides that it is a prohibited unfair labor practice to restrain or coerce any employee "... in or because of the exercise of any right guaranteed under this Chapter".

Furthermore, the City's position before the fact-finder that retroactivity remained negotiable disregards and, in so doing, frustrates the statutory requirement that the parties are to submit to the fact-finder their last, best and final offer. 19 Del.C. §1615(f) (1986).

(2) Retiree Identification Cards: The fact-finder observed:

> The City relies upon testimony provided by the Chief of Police to oppose issuance of identification cards to retirees. The Chief gave two reasons for opposing the Union's proposal: (1) potential abuse (e.g., waiver of traffic violations); and (2) potential liability to the City. The Fact-finder finds that the City failed to mount an affirmative defense for denying retirees identification cards. Her conclusion is based, in part, upon the fact that a retiree identification card can, in no way, subject a jurisdiction to liability for the behavior of any retired person. Indeed, the City ultimately agreed to this fact. Second, if the City really believed that it had a legitimate case that such cards would be abused, then it is incumbent upon the City to provide supporting evidence (e.g., evidence from other jurisdictions that have granted retiree identification cards). No such evidence was provided in this proceeding. Thus, however earnestly the Chief of Police held the belief to which he testified, absent any proof, the Fact-finder held that his testimony is based upon speculation, rather than fact.

The City's perceived concerns are, in the first instance, not valid as acknowledged by the City at the fact-finding hearing and, in the second instance, are mere conjecture unsupported by factual evidence in the form of testimony or documentation.

After six (6) months of bargaining, including the assistance of a mediator from the Federal Mediation and Conciliation Service, good faith bargaining requires a greater effort at fact-finding than a stated willingness to continue bargaining and conjecture in the form of unsupported concerns.

The remaining two (2) issues involve the percentage of the employees' pension contribution and the number of years upon which the final average

compensation portion of the pension formula is to be calculated. The City's position at fact-finding was that, although it proposed to reduce the rate to 5.5% effective upon ratification by the FOP and to 5.00% effective one year later, both the contribution rate and the effective dates remained negotiable.

As with the issue of wage retroactivity, the statutory requirement for last, best and final offer fact-finding removes the employee contribution issue from the category of "still negotiable".

Concerning the requested reduction in the number of years for determining the final average compensation portion of the pension formula, the City argued before the fact-finder that the FOP's demand was rejected because of its long-term impact on pension costs which the City claims its actuaries estimate at approximately two percent (2%). However, the City introduced no figures, assumptions or rationales upon which the two percent (2%) cost projection was based. Nor was there testimony from the individuals responsible for the alleged actuarial projection. By limiting its presentation on this issue to argument in the form of a conclusionary statement, the City effectively deprived the Union of the opportunity and its right to verify, contest or otherwise rebut the City's position.

Considering the statutory criteria which the fact-finder is required to consider vis-a-vis the relative content of the presentations of the parties at the fact-finding hearing on August 2, 1993, the fact-finder had no alternative other than to adopt as her recommendation for settlement the last, best and final offer submitted by the FOP.

As previously discussed, inferences of good and bad-faith bargaining can be based upon the manifestations of one's state of mind. Whether based upon real or circumstantial evidence, an inference must be supported by substantial evidence on the record as a whole, such that the evidence is adequate in a reasonable mind to

support the conclusion reached. Wilmington Firefighters Association v. City of Wilmington, Del. PERB, U.L.P. No. 93-06-085 (1994).

Following the conclusion of the fact-finding process, the City refused to provide the Union with a copy of the position statement setting forth the reasons for its rejecting the fact-finder's recommendations provided to the press on August 25, 1993.

The City's defense of its refusal is twofold: First, it claims a copy of the statement was never requested by the Union's bargaining committee; and second, because the Lodge President Penoza received a copy from the News Journal reporter on August 25, 1993, the Union was not prejudiced by the City's action.

The City's argument fails on both counts. There is no dispute that FOP Lodge No. 4 is the exclusive bargaining representative of all the City's police officers except for the position of Chief. Pursuant to §1602 of the Act, as President of the exclusive representative, Captain Penoza was entitled to a copy of the City's position statement released to the press on August 25, 1993, upon request.

Second, there is no precedent for the City's contention that actual prejudice or harm is a condition precedent to finding a breach of the duty to bargain in good faith. In Brandywine Affiliate, NCCEA/DSEA/NEA v. Brandywine School District Bd. of Education (PERB U.L.P. No. 85-06-005 (1985)), the PERB, while discussing the nature of the duty to bargain in good faith concluded:

> ... nor can either party refuse or fail to fully cooperate in attempting to resolve legitimate differences. The statutory duty of representation necessarily encompasses the right to conduct a reasonable investigation which, if not otherwise privileged, includes access to relevant information necessary for the bargaining representative to intelligently determine facts, assess its position and decide what courses of action, if any, to pursue.

The duty to bargain in good faith continues beyond the rejection of the fact-finder's report. Otherwise, a party could impose a limitation upon the duty to bargain where none is provided in the statute. The City's statement was clearly relevant

insofar as the continuing negotiations were concerned. The fact that Captain Penoza obtained a copy from a newspaper reporter was unknown to the City at the time and, regardless of the City's knowledge, does not relieve the latter of its duty to provide relevant information.

To accept the employer's argument would require the exclusive bargaining agent to rely upon and to react or respond to information it might by happenstance acquire elsewhere as opposed to participating in "collective bargaining", within the meaning of §1602(c) of the Act.

Clearly, such a result was not intended by the Legislature when, in §1601, Statement of Policy, it declared that it is the:

> ... policy of the State and the purpose of this chapter to promote harmonious and cooperative relationships between public employers and their employees, employed as police officers and firefighters...

and required:

> ... public employers and organizations of police officers and firefighters to enter into collective negotiations with the willingness to resolve disputes relating to terms and conditions of employment...

The non-binding fact-finding provisions of the statute are premised upon the theory that a recommendation by a neutral third party accompanied by statements from the parties explaining their respective positions with respect to the recommendations will enable the public to understand the issues and exert public pressure to bring about a resolution of the impasse. The distribution of a position statement by one party to selected members of the press accompanied by a refusal to provide it to the other party to the negotiations is clearly not conducive to resolving the impasse nor does it foster a cooperative and harmonious labor-management relationship.

The other allegations and arguments raised by the FOP, although considered, were determined to lack the necessary quantum of supporting evidence. The allegation of surface bargaining by the City is supported by the evidence.

Although it was apparently necessary for Mr. Zusag to check with some other party away from the bargaining table on numerous occasions, the testimony of Officer Corcoran, Mr. Zusag, and Chief Hogan and Employer Exhibits Nos. 1 and 2 documenting movement by the City during the course of negotiations adequately rebut any assertion that the City's chief negotiator was totally lacking in the authority necessary for the parties to engage in meaningful bargaining.

Nor does the record support a finding that the City engaged in misleading bargaining tactics or withdrew from tentative agreements previously reached. The testimony of Corporal Weldin confirms that the FOP was aware that Mr. Zusag was required to review the tentative settlement reached during the second mediation session with City Council. Despite the FOP's frustration, Council's rejection does not rise to the level of repudiating prior tentative agreements.

The record likewise fails to support the Union's belief that full wage retroactivity was resolved on August 20, 1993. There is no evidence to support a finding that a meeting of the minds occurred. The package offered by Mr. Zusag addressed all unresolved issues and was intended to resolve the existing impasse. The testimony of the FOP witnesses confirms that the overall package was considered unacceptable by the Union and was rejected.

The impasse resolution procedures of mediation and fact-finding are basic rights created under §§1614 and 1615 of the Act. The City's refusal to consider full wage retroactivity solely for the reason stated, is inconsistent with its continuing duty to bargain in good faith after the expiration of the current agreement and thus violates §§1607 (a)(1), (a)(5), and (a)(6) of the Act, as alleged.

Furthermore, even when viewed in a light most favorable to the City, the conduct in question, including not only the retroactivity issue but also its failure to post the notices of the fact-finding meeting as directed, unilaterally changing the meeting location of the fact-finding hearing without posting a notice of change at the entrance to Council Chambers and its refusal to provide the FOP with a copy of its position statement issued to the press in response to the fact-finder's recommendations demonstrates a serious, if not willful, disregard for the duties and responsibilities imposed by §§1614 and 1615 of the Act.

The impasse resolution procedures provided for in the *Police Officers and Firefighters Employment Relations Act* are advisory and do not bind the parties to the recommendations of the fact-finder. Good-faith participation in the process is, therefore, a basic requirement of fundamental importance if the statutory objectives of resolving collective bargaining disputes and protecting public safety are to be realized. A party covered by the Act cannot choose when it will engage in collective bargaining with the other. Nor can it pick and choose with impunity from among the processes provided in the Act, involving itself only in those which it unilaterally determines are appropriate or considers beneficial to its position.

In summary, the record in this case clearly establishes that FOP Lodge No. 4 was treated differently at the bargaining table than were the other two (2) bargaining units. The City acknowledges that wage retroactivity remained an open issue because the City wanted to make the FOP aware that extending the negotiations to include the impasse resolution procedures under the Act had associated costs.

The record establishes not only that the City's representatives did not "like" the fact-finding process but also that every effort was made by the City to minimize its significance and viability as a means for resolving the impasse. The City's failure to post notices of the hearing and the last minute change in the hearing location, when viewed in isolation, may appear trivial. However, coupled with the City's

refusal to proffer a firm last, best and final offer as required by statute, its failure to present evidence in the fact-finding hearing necessary to comply with the statutory requirements, and its defense that it was unaware that certain issues remained unresolved support the determination that there existed an intended pattern of behavior by the City based upon an underlying motive to interfere with the rights of the bargaining unit members to its own advantage.

The conclusion reached by the PERB concerning the City's refusal to bargain the issue of full wage retroactivity is supported by the recommendations of the fact-finder, a neutral third party selected by the parties who had no prior interaction with them. Based upon her interaction with the parties during the fact-finding hearing, she concluded that the City's position concerning the issue of full wage retroactivity bordered on bad faith bargaining.

The conclusion reached herein is further reinforced by the City's post-hearing conduct. Despite a request from President Penoza, the City refused to provide the FOP with a copy of the position statement which it issued to selective members of the press in response to the fact-finder's recommendation.

Employees, either individually or through the exclusive bargaining representative, should not find it ncessary to resort to the filing of unfair labor practice charges in order to secure the basic protections guaranteed to them by the Act.

## CONCLUSIONS OF LAW

1. By the totality of its conduct, consisting of the following incidents, the Respondent City of Newark has engaged in conduct in violation of §§1607 (a)(1), (a)(5), and (a)(6), as set forth below:

a. Refusing to negotiate full retroactivity solely for the reason that the FOP did not settle the contract prior to expiration, but rather petitioned for

fact-finding, as admitted by the City's representative during the August 2, 1993, fact-finding hearing;

b. Summarily rejecting fact-finding as a means for resolving the collective bargaining impasse, as expressed by its chief negotiator at the bargaining sessions of March 31 and September 1, 1993;

c. Failing to post the notices of the August 2, 1993 fact-finding hearing as required;

d. Unilaterally changing the location of the fact-finding hearing without posting appropriate notice of the change;

e. Failing to meaningfully participate in the fact-finding hearing by providing factual evidence in the form of direct testimony and/or documentation supporting its position, as required by §1615 of the Act.

f. Refusing to provide the FOP with a copy of the City's response to the fact-finder's recommendations upon request from the FOP President.

REMEDY

PURSUANT TO 14 Del.C. §4006(h) (1983) which is specifically incorporated in the Act at 19 Del.C. §1606, THE CITY OF NEWARK IS ORDERED TO:

I. CEASE AND DESIST FROM:

a. Engaging in conduct which tends to interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under the *Police Officers and Firefighters Employment Relations Act*;

b. Refusing to bargain collectively in good faith with FOP Lodge No. 4, which is the exclusive bargaining representative of the City's police officers except for the position of Chief;

c. Refusing or failing to comply with any provision of this chapter or with rules and regulations established by the Board pursuant to its

responsibility to regulate the conduct of collective bargaining under this chapter.

II. Within ten (10) days of receipt of this decision, post the Notice of Determination in all areas where notices of general interest to the affected employees are normally posted, including but not limited to the Municipal Building and the police station. This Notice shall remain posted for a period of thirty (30) days.

FURTHER, the City has violated its primary duty to bargain in good faith and has interfered with the rights of its employees to be represented in collective bargaining. It should not be permitted to benefit as a result. Therefore, the City is hereby ordered to reimburse FOP Lodge No. 4 for all reasonable costs of processing this unfair labor practice charge, not to exceed four percent (4%) of dollars of direct earnings to the bargaining unit members saved by the City between April 1, 1993, and the effective date of the wage increase included in the collective bargaining agreement.

**IT IS SO ORDERED.**

*/s/ Charles D. Long, Jr.*
**Charles D. Long, Jr.**
Executive Director, Delaware PERB

*/s/ Deborah L. Murray-Sheppard*
**Deborah Murray-Sheppard**
Principal Assistant, Delaware PERB

DATED: *25 May 1994*

ATTACHMENT A

PRESENTATION FOR FACT FINDING
PUBLIC HEARING
BY
THE CITY OF NEWARK
AUGUST 2, 1993

Negotiations for a successor agreement between the City of Newark and the Fraternal Order of Police, Lodge No. 4 commenced on February 2, 1993. The agreement in effect at that time, like the City's other two union agreements, was 27 months in duration and due to expire on March 31, 1993. Negotiations between the City and its other two unions were being conducted simultaneously with these negotiations.

The City reached final agreements with AFSCME Local 1670 and the Employees Council on April 7 and April 12 respectively. Each of these agreements provided for a 4% increase in base salaries on April 1, 1993 and another 4% on April 1, 1994. Both new agreements are for two years and will expire on March 31, 1995. Neither group received any significant increase in any other benefits.

During this round of negotiations, the City and the FOP have already tentatively agreed to several items which are favorable to the FOP. The City has agreed to pay the entire cost of uniform shoes, to incorporate new language which provides for partial reimbursement for job-related coursework, to expand the use of Out-of-Grade Pay and to revise work schedules on designated holidays. The City has dropped all proposals requesting concessions from the FOP. The Tentative Agreement is attached as Appendix A.

The amount of the wage increase to be granted to the FOP is not in dispute. Both the City and the FOP have proposed that the FOP receive an increase of 4% during the first year of the contract and another 4% during the second year. These amounts exceed current inflation rates.

The effective dates of these increase are still unresolved. The City remains opposed to granting <u>full</u> retroactivity for the first increase. The City has always proposed that the pay increase become effective upon ratification by the union, even if that occurred prior to April 1, 1993. The City has advised the union negotiating team and its president on several occasions that the effective date of the first increase is still negotiable.

The most significant unresolved issue between the City and the FOP involves police pension benefits. Police retirement pensions are based on their years of service multiplied by their Final Average Compensation. Their Final Average Compensation is currently determined by calculating their average pay over the last 36 months of employment. The FOP has proposed to increase the Final Average Compensation by reducing the period of time to the final 12 months of employment.

The City remains opposed to this proposal because of the potential long-term impact that it would have on the cost of the pension plan. While it has been estimated by the City's actuary that this change would increase the City's pension costs by approximately two percent (2%), the actual amount cannot be known because it is dependent upon the size of future salary increases. Given its fiduciary responsibility to the members of the pension plan, which includes all City employees and retirees, the City remains opposed to any changes to the plan which will increase costs by an undetermined amount over the long term.

The City also remains opposed to this proposed change because of the irreversible nature of a change in this benefit. If the City were to agree to this change, the FOP would never consider a lessening of this benefit in the future if it became too expensive.

For these reasons, the City has proposed an improvement in the police pension plan which has a measurable impact on the costs of the plan by reducing the amount employees are required to contribute. The City's police employees currently contribute 6.25% of their base pay and longevity to the pension plan on a pre-tax basis. This is in addition to their 7.65% FICA contribution on all wages. The City has proposed to reduce this rate to 5.50% effective upon ratification by the FOP and to 5.00% effective one year later. The City has advised the union negotiating team and its president on several occasions that both the contribution rate and the effective dates are still negotiable. The FOP has responded that their membership is not interested in this offer. They, therefore, declined to offer any counter proposal on this issue.

The City remains committed to its position and believes that it has offered the FOP reasonable and fair proposals for a successor agreement. The City remains prepared to negotiate the following issues to achieve a settlement.

1. Partial retroactivity of any wage increase.

2. The amount and effective dates of any decreases in employee pension contributions.

It is the City's sincere hope that resolution of these issues and the withdrawal of all other issues by the FOP will result in a final settlement of these negotiations.